

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5

Proceedings reported by stenotype.

Transcript produced by computer-aided transcription.

A P P E A R A N C E S:

FOR THE GOVERNMENT: ALLISON JAROS
allison.jaros@usdoj.gov
Office of the U.S. Attorney
201 Third Street, Northwest #900
Albuquerque, New Mexico 87103
505-346-7274

FOR DEFENDANT: EDWARD D. BUSTAMANTE
eobatty@hotmail.com
620 Gold Avenue, Southwest #200
Albuquerque, New Mexico 87102
505-842-9093

1 THE COURT: United States v. Jensen
2 Peshlakai, Case Number CR-18-3323.

3 MS. JAROS: Good afternoon, Your Honor.
4 Allison Jaros on behalf of the
5 United States.

6 THE COURT: Good afternoon.

7 MR. BUSTAMANTE: Good afternoon, Judge.
8 Edward Bustamante for Mr. Peshlakai, who is
9 present.

10 THE COURT: I'm sorry, Counsel. Could you
11 say your name again?

12 MR. BUSTAMANTE: Edward Bustamante.

13 THE COURT: Mr. Bustamante.

14 Have we -- have you been before me before?

15 MR. BUSTAMANTE: I believe about two years
16 ago, Judge.

17 THE COURT: That's what I thought. I
18 thought I recognized the name.

19 And, Ms. Jaros, you look familiar as well.

20 MS. JAROS: I don't believe I've appeared
21 before you, Your Honor.

22 THE COURT: All right. Well, welcome.

23 This matter is before the Court on a review
24 of -- or appeal of a magistrate judge's detention
25 order in this case.

1 I have reviewed the appeal, as drafted by
2 defense counsel, and I have reviewed the
3 United States' response. And I'll afford counsel the
4 opportunity to make any additional oral argument, and
5 then I will turn to the issues of ruling in this
6 matter.

7 I would note, for purposes of you being
8 comfortable with me understanding what the issues
9 are, the defendant has been charged by way of an
10 indictment with second-degree murder for the alleged
11 death of a John Doe, who was a passenger in a truck
12 who had stopped to intercede between the defendant
13 and his wife.

14 After he did that, she allegedly got into
15 the passenger's truck, and the defendant then rammed
16 the truck and ultimately is alleged to have run over
17 the John Doe, who later died that day from the
18 injuries suffered.

19 The defendant also has, I believe in 2013,
20 suffered from severe traumatic brain injuries and is
21 currently under treatment and care and various
22 medications. That is part of the issues raised in
23 the appeal.

24 He also has a history of alcohol use and
25 abuse. And on the date in question, or the date of

1 the alleged murder, was under the influence of
2 alcohol.

3 And those are the essential facts that I
4 understand.

5 Mr. Bustamante?

6 MR. BUSTAMANTE: Judge, prior to argument,
7 I have a request for the Court.

8 As you can see, my client does have a
9 fairly severe scar on the right side of his head.
10 And if the Court could allow him to have a seat,
11 Judge, at this front chair. He also has a hard time
12 hearing. I'm not sure it's related to the injury,
13 but he expressed that.

14 So if he could please have a seat.

15 THE COURT: He can have a seat. We can
16 also provide him with a set of headphones so he can
17 hear.

18 We'll turn the volume up.

19 MR. BUSTAMANTE: Thank you, Judge.

20 THE COURT: Unfortunately, the interpreter
21 left with the headphones.

22 So can you hear okay, sir?

23 THE DEFENDANT: Yes.

24 THE COURT: All right.

25 Mr. Bustamante?

1 MR. BUSTAMANTE: May it please the Court.

2 Judge, on December 13th, the magistrate did
3 listen to argument and decided to detain
4 Mr. Peshlakai. But she did express some concerns
5 that if Mr. Peshlakai's medication was disrupted or
6 he was not receiving proper medication, Judge, she
7 would certainly consider amending conditions.

8 And the concern I have, Judge, is that I
9 don't think the Court was privy to the government's
10 argument at that time. But the government felt that
11 because Mr. Peshlakai -- and I think it's a given,
12 Judge, that Mr. Peshlakai is in a fairly fragile
13 state -- the question is: How are we going to deal
14 with that fragile state as the case continues?

15 But the magistrate did state, Judge, that
16 if he's not receiving medication properly, she would
17 certainly consider amending conditions of release.

18 My concern is, Judge, that the government's
19 argument at that time was, Look. If he's that
20 fragile, the best place for him is in a correctional
21 facility, where he will -- we will all ensure he
22 receives his medication.

23 I'm asking the Court, Judge, to sort of be
24 wary about that argument and consider allowing him to
25 go to La Posada.

1 And I ask the Court to be wary about that,
2 Judge, because I agree that the facility in Milan
3 will likely get him his medication. But it is first,
4 Judge, and foremost, a correctional facility.

5 At this point, Judge, he's not in a medical
6 facility. If he was in Illinois being evaluated, we
7 certainly would not raise a whisper about whether he
8 was getting proper medication.

9 But my concern is, Judge -- and I've had
10 this conversation with Mr. Peshlakai -- is that he's
11 stated to me, Judge, and I state this by way of
12 proffer, that the only medication he now is
13 receiving, Judge, and has continued to receive since
14 his arrest, Judge, is an anti-seizure medication.

15 Because of that, Judge, and because he's
16 not receiving the battery of medications, he says
17 that his head pressure continues to increase. He's
18 feeling more and more fatigued. He's having a hard
19 time remembering things.

20 My other concern is, Judge, that because
21 it's a correctional facility, they get him his
22 medication when they get to him. And I think, Judge,
23 it's equally important for someone in my client's
24 fragile condition, that he receive the medication at
25 a set time every day. And it's just not happening in

1 the facility.

2 I've talked with him. He says sometimes
3 they are early, sometimes they are late. Sometimes
4 he's so fatigued that he has to go to sleep because
5 of the pain, and he's unable to receive the
6 medication at all.

7 They ask him, Why weren't you there?

8 He said, Well, I just couldn't wait until
9 you got here.

10 So I think those concerns the magistrate
11 expressed are ongoing, Judge. So we're asking the
12 Court to allow him to go to La Posada.

13 Judge, my client did sign a release to get
14 his medical records to me. Unfortunately again,
15 because it's a correctional facility, I spoke to them
16 about that. I told them it's urgent that I get these
17 documents.

18 And they stated, Well, we have 30 days to
19 comply, and we'll get those to you when we get those
20 to you. So I'm still waiting.

21 If the Court feels that after I make my
22 argument, after the government responds, I would ask
23 the Court possibly to consider holding your decision
24 in abeyance until we get those medical records. And
25 I'm assuming we'll confirm whether he's receiving one

1 medication or a battery of medications, Judge.

2 THE COURT: Let me ask you this before we
3 go further.

4 In terms of La Posada, it's my
5 understanding that they were not -- given the
6 circumstances and the conditions of the defendant,
7 they were not willing to accept him.

8 Has that changed?

9 MR. BUSTAMANTE: Well, Judge, I think they
10 were -- I don't think they said they would refuse to
11 accept him. I think they said, Look. We're just not
12 equipped to do that.

13 We're not asking La Posada, Judge, to be
14 his medical guardian. We're just simply asking
15 La Posada to monitor him, to see whether he's on --
16 drinking alcohol. If he's drinking alcohol, Judge,
17 that's a fairly easy decision for the Court to put
18 him back into custody.

19 We are asking La Posada to allow his family
20 to bring the medications in, to hold the medications.
21 And when he comes for the medications, that they
22 allow him to have them and then they take custody of
23 the medications.

24 Again, that's all we're asking the Court,
25 Judge.

1 THE COURT: And my question is: Are they
2 willing to do that?

3 MR. BUSTAMANTE: At the last hearing,
4 Judge, I think it was -- they were wary about it.
5 They said, Look. If he's that fragile, we're wary
6 about it. I think that's where we left it, Judge.

7 And again, Judge, I would echo that we
8 can't say, Well, the best -- because this person is
9 so fragile, the best place for him is in a
10 correctional setting. So I think that's sort of
11 letting everyone off the hook, Judge.

12 So I'm asking the Court to set conditions.
13 If the Court feels a GPS monitor is appropriate, we
14 certainly don't object to that. And if La Posada
15 steps up and says, We refuse to do it, you know, we
16 can continue to litigate things.

17 But at this point, Judge, I'm asking the
18 Court to set those reasonable conditions.

19 The government felt he was a danger, Judge.
20 If you order him to La Posada, place him on a GPS
21 monitor, he will not have access to a vehicle. He
22 will in no way be able to drive. And that is sort of
23 the crux of this matter, Judge.

24 I know the Court laid out some bare facts
25 about what occurred. But the biggest concern, Judge,

1 I think for the government, the community, and the
2 Court, is that if he doesn't have access to a
3 vehicle, I don't think he's a danger.

4 He's certainly not a flight risk, Judge,
5 given his medical condition, given the fact that he
6 has family in Farmington, has a wife in the immediate
7 area who will be of some support to him, Judge.

8 So I am asking, Judge, that the Court
9 consider setting conditions of release. It would be
10 a much better argument, Judge, if I had those medical
11 records for you, to show you that all the medication
12 he is receiving is the anti-seizure medication. I
13 don't have those.

14 But my client has said to me, That's the
15 only medication I'm receiving.

16 So I'm asking the Court that we just
17 proceed, that that is accurate information. I don't
18 see why he would -- it's not self-serving in any way,
19 Judge, for him to exaggerate what's going on at the
20 facility.

21 So we are asking, Judge, to allow him to be
22 released to La Posada.

23 Judge, this occurred in -- the allegations
24 and the events occurred in mid July. The case went
25 to the grand jury in mid October. So there was a

1 period of time where my client was in the community
2 unsupervised and he did not commit further crimes.
3 In fact he did the responsible thing, by retaining
4 counsel. He retained counsel, and that counsel was
5 in contact with the government. I think that's how
6 the government became alerted that he has a closed
7 head injury and is in fragile condition. So there
8 was contact, Judge.

9 And from the criminal complaint, I
10 believe -- or maybe it was the pretrial services
11 report -- it was clearly indicated that that prior
12 private counsel was working with federal authorities
13 to arrange a turn-in date, when the case went from
14 the grand jury with their charge.

15 So he wasn't fleeing, Judge. He had
16 counsel. He is in that fragile state.

17 So we're asking the Court, Judge, to set
18 reasonable conditions for him. And if that doesn't
19 work, Judge, it doesn't work. But I think, given the
20 fact that he won't have a vehicle, La Posada would be
21 monitoring not his medications, but to see if he's
22 drinking, it is a reasonable first step, Judge.

23 And my guess is, Judge, in the near future,
24 either in custody or out of custody, there will be a
25 mental health evaluation for my client to determine

1 multiple things, including if he can proceed in this
2 matter.

3 So that's our request.

4 THE COURT: Thank you, Mr. Bustamante.

5 Ms. Jaros?

6 MS. JAROS: Your Honor, the government is
7 requesting that the Court uphold the magistrate
8 judge's determination that the defendant would, if
9 released, be both a danger to the community and a
10 risk of nonappearance.

11 The government isn't seeking detention
12 based on the defendant's health condition, about
13 which the government has very limited information.

14 The government is seeking detention based
15 on the nature of the offense, the facts of which the
16 Court has summarized.

17 I would note that the government has the
18 case agent, Agent Lance Romney, present, if the Court
19 has any additional questions about the facts.

20 The government is also seeking detention
21 based on the defendant's criminal history, which
22 confirms that he is a danger to the community.

23 He has a history of alcohol abuse that
24 predates his head injury.

25 He also has a violent criminal history.

1 This goes beyond just drinking and driving issues.
2 He's been arrested for aggravated battery, battery on
3 a household member, and domestic assault.

4 In 2016 he was convicted of assault and
5 battery with a dangerous weapon.

6 And then as the magistrate judge noted, he
7 also has a history of failing to appear and violating
8 his probation, which raises a risk -- a concern about
9 risk of nonappearance.

10 Given these facts, the government doesn't
11 believe he's a good candidate for release to the
12 halfway house, no matter what his medical condition
13 was.

14 It's the government's understanding,
15 however, that La Posada was not willing to accept him
16 as a resident. If there's some question about that,
17 maybe pretrial services could address it. But that
18 was my understanding at the time of the detention
19 hearing.

20 The government doesn't know of any other
21 suitable placement for the defendant and is
22 requesting detention.

23 THE COURT: All right.

24 Mr. Bustamante, it's your motion. I will
25 hear from you last.

1 MR. BUSTAMANTE: I just want to reiterate,
2 Judge, that the allegations are from July. I think
3 we'll concede that everyone at the scene was drinking
4 heavily. I argued this to the magistrate.

5 Second-degree murder is, I think, a
6 charging decision. I think it is somewhat
7 subjective. My guess is this case is in the running
8 for an involuntary manslaughter, but it will be
9 played out at some other time, Judge.

10 But he was out in the community for those
11 two months, was acting responsibly, arranged to turn
12 himself in, so we're asking the Court to set
13 conditions.

14 THE COURT: Well, a couple of things with
15 regard to this Court's review.

16 As set forth in United States versus Mobley
17 725 Phoenix 441, 2017, a December 19, 2017, Tenth
18 Circuit decision, the Bail Reform Act, Section 3142,
19 sets out the framework for evaluating whether
20 pretrial detention is appropriate.

21 In general, persons charged with a crime
22 are not detained. It's the United States versus
23 Salerno, 481 US 739 at 755.

24 But a defendant may be -- may be detained
25 pending trial if a judicial officer finds that no

1 conditions or combination of conditions will
2 reasonably assure the appearance of the person as
3 required, and the safety of any other person and the
4 community, under 18 USC Section 3142(e)(1).

5 A judicial officer may make such a finding
6 only after holding a hearing under Section 3142(f).
7 See United States versus Cisneros, C-I-S-N-E-R-O-S,
8 328 F.3d. 610 at 616, Tenth Circuit 2003.

9 The government bears the burden of proving
10 risk of flight by a preponderance of evidence, and
11 dangerousness to any other person or the community by
12 clear and convincing evidence.

13 Under 3142(g), the judicial officer must
14 consider four factors as part of the evaluation.

15 One, the nature and the circumstances of
16 the offense charged, including whether the offense
17 involves a minor victim.

18 Two, the weight of the evidence against the
19 person.

20 Three, the history and the characteristics
21 of the person.

22 And four, the nature and seriousness of the
23 danger to any person or the community that would be
24 posed by the person's release. See 3142,
25 Section (g).

1 A detention order must include written
2 findings of fact and a written statement of the
3 reasons for the detention. See Section 3142(i).

4 But a reviewing district court can state
5 its reasons for detention in writing or orally on the
6 record. A district court conducts a de novo review
7 of the magistrate judge's order. See Cisneros at 616
8 at Footnote 1.

9 This Court would review the underlying
10 findings of fact for clear error, as noted in
11 Cisneros.

12 I have reviewed the detention order and in
13 this matter that detention order notes that -- one
14 moment. I've got my electronic version I need to
15 find.

16 In this case, the order of detention, which
17 is UCF Document Number 12, notes that after
18 considering those factors under 3142(g) and the
19 information presented during that detention hearing,
20 the magistrate judge determined that the government
21 has proven by clear and convincing evidence that no
22 condition or combination of conditions of release
23 will reasonably assure the safety of any other person
24 in the community; and by a preponderance of the
25 evidence that no condition or combination of

1 conditions of release will reasonably assure the
2 defendant's appearance as required.

3 In addition to those findings made on the
4 record -- I've reviewed that record -- the reasons
5 for detention include prior criminal history. As
6 noted in this case, the defendant has prior criminal
7 history, most of which involves alcohol, and which
8 also involves violence, battery, assault, and those
9 types of things.

10 There's a history of violence for use of
11 weapons, which is also checked.

12 There's a history of alcohol or substance
13 abuse, which was also checked.

14 There is the prior failure to appear in
15 court as ordered.

16 I believe those were for traffic
17 violations. There may be a DUI.

18 And there's prior violations of probation,
19 parole, or supervised release.

20 In the end, applying the standards that
21 this Court must, in reviewing the order of detention
22 as well as the transcript from that detention
23 hearing, the Court would find that the magistrate
24 judge properly considered, applied the proper legal
25 standards, made factual findings that appear to be

1 not in clear error, and found that there is --
2 finding the proper standard of burden of proof --
3 that there is clear and convincing evidence that no
4 conditions or combination of conditions could
5 reasonably assure the safety of any other person in
6 the community.

7 Part of that involved the concerns of not
8 having any kind of facility in which he could be
9 placed.

10 There was also a letter that was, I
11 believe, attached from his neurologist or from his
12 treater, indicating his need for care, which required
13 La Posada to indicate that they did not believe that
14 they could provide a sufficient care.

15 And given that, given his alcohol use and
16 the risks that he presented, if we were all without
17 cars and vehicles, it might be one thing. But I have
18 concerns that that would not eliminate, in this
19 circumstance, the potential risk of harm.

20 There's also the consumption of alcohol
21 that has continued to have occurred, despite his --
22 his 2013 injuries, and the violence associated with
23 that.

24 So I am more focused on the danger to the
25 community, or safety, as opposed to his risk of

1 nonappearance. I think that that's less, or
2 certainly mitigated by his self-reporting or
3 self-surrender.

4 But nonetheless, I find that there's more
5 than adequate facts to support the magistrate judge's
6 ruling and detention, given the standards applied
7 under the Tenth Circuit precedent.

8 As to the issue of his medications. That,
9 to me, appears to be an issue of new facts or
10 circumstances that may justify going back before the
11 magistrate judge for review, because that certainly
12 was a concern.

13 But at this point in time, I -- that would
14 require additional evidence, and I'm not in the
15 position of an evidentiary review, but a review of
16 the record and the evidence that was presented before
17 the magistrate judge.

18 So if those facts have changed, and if you
19 receive those medical records in the 30-day period of
20 time that they now have told you they would get them
21 to you, and they reveal that he's not getting the
22 medications that he needs, then that should be a
23 matter brought to the attention of the magistrate
24 judge for review.

25 Otherwise, the Court would affirm the

1 decision and detention in this matter.

2 MS. JAROS: Thank you, Judge.

3 MR. BUSTAMANTE: Thank you, Judge.

4 THE COURT: Any other matters we need to
5 address in this case, Mr. Bustamante?

6 MR. BUSTAMANTE: No, Your Honor. Thank
7 you.

8 THE COURT: Thank you.

9 And, Ms. Jaros?

10 MS. JAROS: No, Your Honor.

11 This was my final matter. May I be
12 excused?

13 THE COURT: Your first and final, yes.

14 (Proceedings concluded at 3:45 p.m.)
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date: April 16, 2021

PAUL BACA, RPR, CCR
Certified Court Reporter #112
License Expires: 12-31-21